Supreme Court, U.S.
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No.

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October Term 1996

IN THE

SUPREME COURT

OF THE UNITED STATES OF AMERICA

ROBERT M. STANDARD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

For a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit; Appendix

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12 pp

QUESTIONS PRESENTED FOR REVIEW

1. Can an attorney taxpayer who honestly believed that deductions taken on his income tax returns were lawful business expenses later be criminally prosecuted for taking "illegal" deductions, in the context of a state law that is not generally enforced but is required to be, under I.R.C. section 162 (c)(2)? And when the trial court judge states that this case has nothing to do with general enforcement of state law, can the taxpayer still be convicted?

2. Despite a Supreme Court case that requires that the payment must be specifically prohibited under the state law in order to be non-deductible, if California adopts a law prohibiting solicitation by non-attorneys for attorneys, but not payment to the non-attorney, can the attorney still be convicted for taking "illegal" deductions for the payment under I.R.C. section 162(c)(2)?

3. Does I.R.S. have the authority to deny deductions on a selective basis when an I.R.S. witness testifies that an "illegal" business activity can deduct its operating expenses?

4. In Commissioner v. Sullivan 356 U.S. 27 (1958), it was held that an illegal business such as gambling can deduct wages and rent to its gambling operators. Is it still valid today?

5. When a California Court of Appeals case held that payments by an

attorney are excluded from the state law in issue, may a federal appeals court import a 1923 Connecticut case to overrule the case?

6. Does a violation of due process occur when a jury requests the written elements necessary to convict under I.R.C. section 7206, but the trial court, despite the repeated objections of the petitioner's counsel, gives only the base elements under I.R.C. section 7206, but not the state law elements as incorporated by I.R.C. section 162 (c)(2), which requires the general enforcement of state law?

7. When a bankrupt is told that there are no assets by a special master appointed to recover assets, does the hope of recovery create a property interest called an "expectancy"? Can the court make the expectancy a property interest? How realistic does the expectancy have to be before it must be disclosed?

8. Does "concealment" equate to the making of a false statement so that materiality becomes one of the elements that must be found by the jury to convict in a bankruptcy concealment case?

9. When a jury which was not allowed to take notes requests testimony read back to it of one key witness, is it a violation of due process to deny the request based upon the judge's idiosyncratic policy of not allowing any of the testimony of any witness read back to the jury?

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Statutes, Constitutions and Regulations

1. 26 U.S.C. §7206, Fraud and False Statements -- (1) Any person who willfully makes and subscribes any return ... which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter...

2. I.R.S. Code §162(c)(2), Other Illegal Payments -- No deduction shall be allowed under sub-section (a) for any payment (other than a payment described in paragraph (1)) made, directly or indirectly, to any person, if the payment constitutes an illegal bribe, illegal kickback, or other illegal payment ... under any law of a State (but only if such State law is generally enforced), which subjects the payor to a criminal penalty or the loss of license or privilege to engage in a trade or business. For purposes of this paragraph, a kickback includes a payment in consideration of the referral of a client, patient, or customer. The burden of proof in respect of the issue ... as to whether a payment constitutes an illegal bribe, illegal kickback, or other illegal payment shall be upon the Secretary to the same extent as he bears the burden of proof under §7454 (concerning the burden of proof when the issue relates to fraud).

3. I.R.S. Regulation 1.162-1 provides in relevant part -- A deduction for an expense paid or incurred after December 30, 1969, which would otherwise be allowable under §162 shall not be denied on the grounds that allowance of

such deduction would frustrate a sharply defined public policy. See §§162(c), (f), and (g) and the regulations thereunder.

4. California Business and Professions Code §6152(a), Prohibition of Solicitation -- It is unlawful for any person ... to act as a runner or capper for any such attorneys or to solicit any business for any such attorneys ... [or for] any person to solicit another person to commit or join in the commission of a violation of subdivision (a).

5. California Business and Professions Code §6151(a)(in 1988 and 1989) --Definitions: As used in this article, a runner or capper is any person, firm, association or corporation acting in any manner or in any capacity as an agent for an attorney at law, or law firm, whether the attorney or any member of the law firm is admitted in California or any other jurisdiction, in the solicitation or procurement of business for the attorney at law or law firm as provided in this article.

6. 18 U.S.C. §152, The Statute Defining the Offense Charged -- The first paragraph of §152 of Title 18 of the United States Code provides, in part, that: "Whoever knowingly and fraudulently conceals from a custodian...of the court charged with the control or custody of property,...any property belonging to the estate of a debtor..." shall be guilty of an offense against the United States.

7. California Insurance Code §754 provides as follows: Unlawful referral fees - effective 1990. (a) It is unlawful

for any person to solicit, receive, offer, or pay any referral fee for the referral of an individual for the furnishing of services or goods for which the person knows or should have known whole or partial reimbursement is or may be made, directly or indirectly, by any insurer. As used in this section, a referral fee is a fee paid by a person furnishing goods or service to another in return for the referral of an individual to that person for the furnishing of services or goods. It includes any referral fee, kickback, bribe or rebate, whether made directly or indirectly, overtly or covertly or in cash or in kind.

8. California Penal Code §337a. Bookmaking or Pool Selling, Keeping or Occupying Place With Paraphernalia for Recording Wages, etc.; Permitting Unlawful Use of Room. Every person ... who keeps or occupies, for any period of time whatsoever, any room, shed, tenement ... or place of any kind ... with a book or books ... for the purpose of recording or registering any bet or bets, or wage...; or who being the owner, lessee or occupant of any room, shed, tenement ... place ... whether for gain, hire ... or otherwise, permits the same to be used or occupied for any purpose, or in any manner prohibited by subdivision 1, 2, 3, or 4 of this section ... is punishable...

No.
October Term 1996
In The United States Supreme Court
United States of America,
Plaintiff-Respondent,
vs.
Robert M. Standard,
Defendant-Petitioner

Jurisdiction and Opinions Below

Standard was indicted on five counts: two counts for filing false tax returns, two counts for bank fraud, and one count for bankruptcy fraud. He was tried by a jury in the Central District of California (Real, J.) and was convicted of all five counts.

On appeal to the Ninth Circuit, the court reversed one count of filing a false tax return (1987) and both counts of bank fraud for lack of evidence. The court affirmed the two remaining counts: the filing of a false tax return (1988), and for bankruptcy fraud. The court's unpublished memorandum opinion was filed on April 26, 1996. A timely petition for rehearing was filed, but denied on May 22, 1996.

This petition follows. The court has discretionary jurisdiction under 28 U.S.C. §1257 to review the two convictions which were not reversed. By order of Justice O'Connor, the time for filing this petition was extended to September 19, 1996.

Statement Of The Case

A.

Petitioner Standard was a personal injury lawyer in Los Angeles whose practice grew very quickly. Standard paid "sources" (doctors, insurance agents, and other people) for referring cases to him. He deducted these payments as ordinary and necessary business expenses on his income tax returns.

The government claimed Standard filed false tax returns under 26 U.S. Code §7206(1) by taking a deduction to which he was not entitled. Internal Revenue Code §162(c)(2) prohibits the deduction of payments for expenses which are illegal under generally enforced state laws. The claim was that the sources were cappers under California Business and Professions Code §6152, which makes it unlawful for a non-attorney to cap cases, defined as the solicitation of cases for an attorney. Yet, the government claimed that the payments to the non-attorneys were illegal in a way that was <u>not</u> specified; neither section of the California law was cited in the indictment, and the statute itself does not proscribe payment.

Indeed, the government produced but one witness, I.R.S. agent Dietch, who actually testified that state law did not proscribe the payments as such, but only the activity of capping.[1] No other

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[1] The payments were deducted on the 1988 tax return. In 1990, Insurance Code §754 was enacted, which for the first time explicitly prohibited payments by

evidence of illegality was submitted.

To prove general enforcement of the capping statute -- the second requirement under the revenue code -- the government produced a city attorney and a state bar representative, but neither could show general enforcement for the years in question. Testifying in 1995, the state bar representative said she was aware of reported cases disciplining lawyers for capping, but that they dated back twenty or thirty years. She was not aware of any cases in the period 1980 to 1990. The city attorney testified that he was personally unaware of any capping prosecutions between 1980-1987, and only a handful after 1990. (For the years in question - 1987 and 1988 - the court would not let him answer the question, saying: "He told us that section at that time, he doesn't know counsel.")

Citing a 1923[2] Connecticut case, the Court of Appeals affirmed Standard's conviction, holding that a solicitation law prohibits payment, citing, State v. Schliefer 121 A. 805 (Conn. 1923). This is totally confusing as Schliefer dealt with a labor organizer seeking to incite strikers to illegality. By analogy, it would only apply to payments the organizers made to the strikers, not offers made to the organizer. In other words, if anything, it would prohibit payments by the cappers to the clients,

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attorneys to non-attorneys for the referral of cases.

[2] The California capping statute was enacted in 1930.

not the attorney to the cappers.[3] But, in any event, even as the court recounts Schliefer, the Connecticut court merely held that a solicitation that contained the promise of payment did not alter the charge to one of attempt. The offer of payment, but not the payment itself, was a solicitation. The Court of Appeals extends Schliefer, which is solely concerned with solicitation, to make not only the promise of payment but the ensuing payment itself proscribed by the solicitation statute even though it simultaneously defines solicitation to be the act of asking. That is, the Court's opinion is internally inconsistent and represents the unwarranted extension of Connecticut law to proscribe a California crime. The text of the Court's opinion is, thus, the very best evidence of the fact that California law did not explicitly prohibit the payment of cappers. As it did not, it does not meet the requirement of §162(c)(2) that the payment as such be proscribed by state law. (It might be noted that Schliefer was not the basis of the government's case. It is raised only by the court of appeals.)

On the second requirement of §162(c)(2) -- that the state law be generally enforced -- the court simply makes the bald conclusion that a trier of fact could find from the testimony of the

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[3] Under California law, a lawyer could be convicted of aiding and abetting cappers by paying them. Hutchins v. Municipal Court, 61 Cal.App.264, 132 Cal.Rptr. 158 (1976). That is, payment as such is not a direct violation of the solicitation statute as a matter of California law.

state bar representative and the city attorney that the law was generally enforced. But as we've just seen, the only enforcement testified to occurred long before and some time after the decade in question. This is not general enforcement.

B.

Count Five of the indictment charged Standard with intentional and willful concealment of an oil and gas investment in Transwestern Oil and Gas in violation of 18 U.S.C. §152 of the Bankruptcy Act.

John Ehrman, operator of Transwestern, swindled Standard out of money. Ehrman was caught, and a special master, Scarborough, was appointed to recover money for the investors after Standard had filed his bankruptcy schedules.

Standard was forced into involuntary bankruptcy in 1990. He converted to a Chapter 11 in April, 1991, and filed schedules in June, 1991. He did not list the Transwestern investment, believing there were no assets to recover. The evidence at trial in fact showed there were no assets when he filed his schedules in June, 1991.

Scarborough had sent a letter to all investors, just after Standard filed his schedules, confirming that there were no assets, and that a recovery was unlikely. A second letter was later sent, also stating that there were no assets.

About the same time, Scarborough appeared in a civil action in Texas, where

Ehrman was ordered to disgorge a portion of the money he looted from Transwestern.

Lawrence Diamant was later appointed trustee for Standard's bankruptcy in June, 1993, when Standard's bankruptcy was converted from a Chapter 11 to a Chapter 7. He testified that some time in October or November 1993 (after Standard's bankruptcy had been dismissed, and after the outside charging date of the indictment, June 30, 1993), he had received a phone call from Ehrman who said he was sending him a check ($66,875) for Standard's interest. Ehrman, Diamant said (Ehrman did not testify), allegedly had talked to Standard by phone and learned of his bankruptcy, which was not true. Such a conversation could not be proven through any independent evidence. Ehrman proposed to send the check directly to the trustee. Diamant testified that when Standard learned of this proposed payment, he should have amended his schedules to list it as an "expectancy."

Diamant, the trustee, testified that if Standard had been told that his investment was worthless, he need not have listed it on his schedules. But he maintained the alleged hearsay telephone conversations between Ehrman and Standard (which Standard said never took place), sometime after the outside charging date of the indictment, should have led Standard to amend by filing new schedules.

There was testimony from Scarborough that in November of 1991, he informed Standard of a court disgorgement order against Ehrman (which Ehrman was attempting to discharge in a bankruptcy

proceeding), and in November, 1992, that he told Standard that he believed he found assets (in companies established by Ehrman after Transwestern had become a defunct entity).

The Court of Appeals held that Scarborough's testimony was enough to create "an expectancy" and that Standard should have listed it on his amended schedules. It also refused to consider whether the admission of Diamont's hearsay statement about what Ehrman had said to Standard was plain error. It refused as well to consider Standard's claim that the trial court would not let his trial counsel cross-examine Scarborough on whether he actually found any assets in companies post-dating Transwestern. It also held that materiality is not an element which required a supplemental instruction in a concealment case, even though the "concealment" was in the failure to disclose the expectancy on amended schedules, which amounts to a false statement.

The Court added that Standard could be convicted of concealment in Transwestern even though the eventual payment was made by JNE Offshore, an unidentified company of Ehrman, about which Standard knew nothing, and even though the payment ($67,875) was made after the bankruptcy had already been dismissed. (The payment was also made after the outside charging date of the indictment.)

On a petition for rehearing, Standard pointed out that an expectancy is not property under California law, that

Diamant had testified that Standard did not have to amend his schedules if he had been told the investment was worthless, and that Standard was forbidden by the trial court from cross-examining Scarborough about the contentions of the Securities and Exchange Commission that Scarborough had not found any assets for the Transwestern investors. Standard also argued that as an expectancy is not property, it could not be concealed -- definitionally. Yet the Court of Appeals affirmed, and held that not allowing cross-examination was within the discretion of the trial judge.

Reasons to Grant the Petition

I
The Decision Conflicts with Commissioner v. Sullivan

Supreme Court Rule 10.1(c) provides that the Court will review a decision that conflicts with its opinions. The present case holds that payments made in furtherance of a proscribed activity are not deductible, even though they are not specifically prohibited. It therefore directly conflicts with Justice Douglas' opinion for a unanimous court in Commissioner v. Sullivan, 356 U.S. 27 (1958).

In Sullivan, an Illinois statute prohibited gambling. The gambling owner deducted the rent and the wages he paid the gambling operators, even though these payments made the proscribed activity possible. The government claimed a disallowance, but this Court did not accede to the claim; because the expenses

were not specifically prohibited, only the gambling activity was illegal. The tax is on net, not gross, income. So, ordinary expenses are deductible even though they make possible the very activity prohibited.[4]

The Government witness, I.R.S. Agent Dietch, testified at trial in a way that shows that the I.R.S. follows Sullivan, supra, but only on a selective basis. Dietch testified that a bookmaker, even though his activities are illegal under state law, can deduct his rent,[5] and that an illegal business can deduct costs incurred or paid in the conduct of an illegal trade or business, with the exception of narcotics.[6]

The Research Institute of America, a principal source of guidance for tax attorneys and accountants throughout the nation, concurs. It states that public policy by itself is not a sufficient basis for disallowing a payment even if it fosters the very activity prohibited. Only those payments specifically disallowed by

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[4] The I.R.S. provides in Regulation 1.162-1 that a deduction cannot be denied on the grounds that allowance of such deduction would frustrate a sharply defined public policy.

5 California has a specific statute prohibiting bookmaking. California Penal Code §337a. The I.R.S. permits deduction for rent and other costs, per Dietch.

6 Gross receipts can, however, be reduced by costs of goods sold. Congress thought that to provide otherwise might raise constitutional issues. S. Report No. 97-494, Vol. 1 (P.L. 97-2498) p. I-309.

state law are non-deductible. (App., Exh. C) Am. Jur. concurs. (App., Exh. D)

The Government also argued that the amendments to I.R.C. §162(c)(2) reversed Sullivan, but the Court of Appeals impliedly rejected the argument. Still, the court disallows payments which are allowed by Sullivan and the I.R.S. in other contexts.

This court needs to revisit and reaffirm Sullivan, lest the aura of the amendments cast a doubtful light on its continued viability. Sullivan clearly precludes Standard's conviction.

II
The Use of a Connecticut Case at Variance with a California Case Violates California Sovereignty

Perhaps the most objectionable part of the Court of Appeals' decision was the use of a Connecticut case to show the payment is proscribed by the California solicitation statute when a California case directly on point shows that paying cappers is prosecuted under the general aiding and abetting laws. Compare Schliefer, supra, with Hutchins, supra.

It simply violates California's sovereignty to have a Connecticut case applied as its law when it has a case directly at variance with it. The Court of Appeals holds that Connecticut's common law of solicitation prohibits payment of cappers under California's statutory capping law. (We know of no theory - legal fiction or otherwise - which supports this application.) But the point is, as a

matter of legislative history, that the capping law California adopted purposely omitted a prohibition of lawyer payments.

The California Court of Appeal shows that the legislature enacted two capping statutes, one prohibiting lawyer payments and the other not. Hutchins, supra, 132 Cal.Rptr., at 163-164. The governor signed the bill that did not proscribe the lawyer payments, pocket vetoing the one that did. Id., at 165.

The argument was made in Hutchins, and explicitly rejected, that it would be foolish to prohibit the activity but not the payment for it, as the Court of Appeals holds here. Yet the California Court of Appeal held that that was exactly what the governor had done. Not to worry, the court added, because the payment as such could be prosecuted under the state's aiding and abetting laws, just as the briber is prosecuted under the federal law that makes the receipt of the bribe alone the federal crime. May v. U.S., 175 F.2d. 994, 1004 (D.C.Cir. 1949.)

As if to seal the matter, the California court considered the rejected proposal outlawing solicitation by lawyers, which is now California Bus. & Prof. Code §6152(a)(2), the section the Court of Appeals relies upon. This section outlawing lawyer solicitation of cappers was intended to eliminate the need for proof of payment otherwise required to convict under the aiding and abetting law. That is, the California court holds that "solicitation" was meant to exclude payments while the federal court holds just the opposite. This just can't be!

It's both a usurpation and an imposition.[7]

This is all the stranger because Judge Hug himself, the presiding judge of the panel in question, had held that on appeal in federal court, the court was to be informed by state court published opinions with which it should achieve uniformity! Matter of McLinn, 739 F.2d. 1395, 1400 (9 Cir. 1984). Not only does the court not achieve uniformity, but it imposes a foreign state's law regardless of the forum state's opinion, thus making the foreign interpretation governing!

Something is seriously amiss here as the court itself cited Hutchins, the very opinion that recounts the legislative history, showing that "solicitation" does not include payment. Indeed, we suggest that the transgression here is so flagrant, so internally inconsistent, and so mindless of California case law that petitioner has been denied due process of law.

We can't think of a better example for the court's supervisory powers. The Court of Appeals has so far departed from the usual and customary course of judicial proceedings that it disregards its own

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[7] Further, Government witness, Lisa Howe, Standard's former bookkeeper, testified that the cappers actually solicited Standard to refer him cases, not the other way around. There is, simply speaking, no proof of solicitation by Standard. Without such a showing of solicitation by Standard, his conviction has no legal basis even under the federal court's rationale.

directive. Clearly, this should not be allowed even if the departure occurs upon review.

III
The Opinion Also Conflicts with This Court's Ratzlaff Opinion

Finally, and most fundamentally, in applying a 1923 Connecticut case to a 1930 California statute, which in turn is enforced for 1988, the court violates principles of lenity to such a degree that a violation of due process of law occurs. This, too, is an unprecedented departure from the usual course of judicial proceedings calling for an exercise of the court's supervisory powers.

We have already shown above that not only were payments intentionally excluded from the capping law, but that "solicitation" of cappers excluded the notion of payment as well; and there is no showing that Standard did any solicitation of cappers. But what the court does is to make an inapposite case from out of state determinative, one that is actually at odds with forum law.

Such an application violates long held approaches to criminal statutes espoused not only among the circuits but by this court as well.

In Ratzlaff v. U.S., 510 U.S. 135, 114 S.Ct. 655 (1994), Justice Ginsburg holds that ambiguities in criminal statutes must be resolved in favor of the defendant. Criminal statutes -- such as the perjury statute at bar -- must give a fair warning to the world in terms it

understands of what it intends to do if a certain line is crossed. Furthermore, it is rare that legislative history will justify an interpretation broader than the text the law requires. Legislatures, not courts, are to pass criminal laws.

How ironic, then, that the Court of Appeals not only disregards the legislative history that supports only the narrowest reading of the capping law, but resorts to an outdated, inapposite, and out of state decision to sustain a conviction under federal law! There's simply nothing in the federal perjury statute that would alert a taxpayer to the kind of legal hurdles the court surmounts here. Not even the most sophisticated taxpayers could read §162(c)(2) and know that California Bus. & Prof. Code §6152 is violated but only if they turn upside down California authority to the contrary and import an inapposite Connecticut case as determinative. Indeed, we venture to say not even a criminal tax practitioner could imagine this scenario.

A further irony is that the Ninth Circuit itself has held that there can be no willful intent to violate the tax law if the tax law, including state law, is unclear and subject to varying interpretations. U.S. v. Dahlstrom, 713 F.2d. 1423 (9 Cir. 1983).[8] The Fourth Circuit agrees that where the law is highly debatable, there cannot, as a matter of law, be the intent needed to

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[8] We contend that under Dahlstrom, Standard cannot be found guilty. At the least, the state statute is subject to different interpretations.

convict. U.S. v. Critzer, 498 F.2d. 1160, 1163 (4 Cir. 1974). Similarly, the Fifth Circuit holds that the government cannot pioneer interpretations of the tax law at the expense of the defendant's freedom. U.S. v. Garber, 607 F.2d. 92, 99-100 (5 Cir. 1979).

The question is simple but important. There is a vast array of prohibited activities by states throughout the country. A citizen should not have to fear federal prosecution based on an out of state case at variance with the home state's substantive law. This surpasses mere contrivance and becomes a machination, as though the government had some special ax to grind against its citizens. This fear should be allayed permanently.

i

General Enforcement

Closely allied to the paranoia that would arise when a citizen is convicted in his home state of violating a foreign state's law is the issue posed by the second requirement of §162(c)(2), that the state law be generally enforced. There simply was no proof of general enforcement. True, there were proofs of enforcement - sporadic enforcement - some twenty years earlier, but laws fall into desuetude with regularity. Much depends not only upon the prevalence of the activity in question but upon the attitude and philosophy of those in power.

Hutchins, supra, shows that the debate against solicitation started in the 1920s, in response to which the

legislature passed two laws, only one of which the governor signed. This was the one that did not proscribe payments by the attorneys! This is a deliberate choice to focus on the problem as such - the cappers, who operated (and still do) autonomously. They broker cases. Lawyers get caught up in a secondary market not of their own making. Aiming the law at the cappers themselves places the focus where it belongs as it is they, not the lawyers, who operate the business. Not prosecuting the lawyers as such, then, can be seen as a rational choice deliberately made by those in power to punish only those who directly perpetuate the problem. This was California's choice. Lawyers were not seen as the problem, but at most auxiliary players in the overall scheme of things.

It should not, then, be surprising to find so few lawyers prosecuted under the aiding and abetting laws; to repeat, this was California's choice. To find "general enforcement" against lawyers when lawyers were specifically excluded from the operation of the law flies in the face of the way California resolved the problem. The very paucity of cases - a handful after 1990, none from 1980 to 1987, and for 1988 and 1989, the trial court would not let the city attorney answer - shows that asking about general enforcement is a meaningless question in California, if the issue is capping. One would have to ask whether it was common, how many cappers were prosecuted (as those are the persons who the law is aimed at), whether there was a policy not to enforce the specific law, and then also ask how many lawyers were prosecuted for paying them. As to all these specific questions, the trial court

would not permit cross-examination of the representative from the city attorney's office by Standard's attorney, on the grounds these questions were all irrelevant. The trial court stated, in open court, that the case had nothing to do with whether the statute (see §6152) was enforced. (See Appendix, Exhibit E)

When the jury instructions were orally given, the trial court gave the four legal elements needed to convict under section 7206. It then separately stated the contents (but incorrectly stated that all kickbacks are illegal) of section 162(c)(2), which made illegal payments non-deductible only if illegal under a state law that is generally enforced. During jury deliberations, the jury requested, in writing, the necessary elements to convict. The trial court, over repeated objections of trial counsel, only gave the base offense elements under section 7206, omitting any reference to section 162(c)(2) that made the payments non-deductible only if illegal under a state law that is generally enforced. Trial counsel made repeated objections to the court's giving only the base elements under section 7206 to convict.

To convict a lawyer - perhaps the first in California history - of violating a tax law in paying cappers when the state did not prosecute, when payment as such was explicitly excluded from the state capping law, and when the trial court said that the case had nothing to do with whether the state statute was even enforced, is effectively to impose a federal policy of enforcement. The

question is, then, how does the federal government justify prosecuting. Asking this question shows that we're not speaking of state law as such which, however, is what §162(c)(2) focuses on. Capping is of local concern, and the policy decision California employed is consistent with the virtually non-existent history of general enforcement against lawyers.[9]

This, too, raises an important question of federalism and about whether federal notions of state rights and wrongs can supplant the states' resolution of their own problems. The federal government simply should have no policy about local problems and is bound by the state's approach to them. This is the only answer compatible with full respect for state sovereignty. The federal government need not run to the rescue of the state because the state does not know what's good for it. This is a paternalism that the Constitution precludes. And it's extremely unfair to shoulder a hapless taxpayer not only with federal law but with federal intervention in a domestic matter where state law is supreme. Surely, in such a case -- a criminal matter, after all -- the taxpayer deserves the benefit of the doubt.

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[9] The Ninth Circuit nevertheless held that there was general enforcement, but since the written jury instructions deleted any requirement for a finding of general enforcement (see supra), Standard was convicted without a finding of general enforcement.

IV
An Expectancy Is Not Property

If one excludes Ehrman's hearsay evidence, the only evidence of what Standard knew came from Scarborough's testimony that Ehrman was subject to disgorgement under the Texas District Court's order (Scarborough also testified that Ehrman was attempting to nullify that court order through his own bankruptcy) and that he thought he found assets in other companies formed by Ehrman after Transwestern ceased to exist. Of course, when the payment was made, it came on a check drawn by JNE Offshore, a company about which Standard knew nothing, and from which Standard had no expectation of receiving anything. And it came after the bankruptcy had been dismissed and after the outside charging date of the indictment. Yet it seems the court took Scarborough's testimony and created an expectancy.

Nonetheless, invoking the rule that a conviction will be affirmed if any rational trier of fact could have convicted, the court splices the evidence to affirm. During deliberations the jury, which was not allowed to take notes during the trial, requested permission to review the testimony of Scarborough. The trial court, in denying the request, stated that it was its policy not to let the jury review the testimony of any witness. This, we believe, is a violation of Standard's due process rights.

Furthermore, and as alluded to above, what the court cannot do is to make an expectancy - a state of mind - property.

This raises a fundamental and important question that goes to the heart of the federal-state relationship in bankruptcy proceedings. Property exists by virtue of state law. If an "interest" is not property under state law, its omission from schedules designed to inventory the bankrupt's property cannot be a crime.

Standard could have no liability. His interest in Transwestern was based on his investment, but it was worthless, as evidenced by two letters sent out by Scarborough stating there were no assets, and Diamant the trustee said it need not have been listed.

So what is left are two entities: Ehrman and JNE Offshore, the latter being a company Standard never even knew existed. Standard never appeared at all in the legal proceedings against Ehrman in Texas, and about which we know virtually nothing. Apparently, Scarborough, the special master, had appeared at a hearing against Ehrman, thinking he would be able to get the court to seize assets from companies that were established after Transwestern had ceased to exist. But we know nothing about these possible assets because on cross-examination, Standard's counsel was not permitted to ask questions about a dispute Scarborough had with the U.S. Securities and Exchange Commission. The S.E.C. did not believe Scarborough had located any assets belonging to the Transwestern investors, and would not endorse his attempt to get the court to seize assets in other companies. This is critical to Standard's defense that there were no available assets. Standard was clearly denied his Sixth Amendment right

to cross-examine Scarborough on the most crucial issue against him. This cannot stand.

And, the preprinted bankruptcy schedules list only two possible places for Standard's "property:" "stocks and bonds," or, "contingent claims." Diamant eliminated the need to list the interest on the original schedules, since he, as the bankruptcy trustee, said it was worthless and it need not be listed. So the government was left with a contingent claim which, as Standard had not made a claim, became transmuted into "expectancy interests." We believe this is impermissible, especially under lenity principles.

In discussing expectancies under California law, Witkin, the authority, quotes Civil Code §1045 which states that a mere possibility, not coupled with an interest, cannot be transferred. 1 Witkin, Summary of California Law, Contracts, §935, p. 835 (9 Ed.). But that's all Standard had. What Standard had, then, was a hope, a state of mind and emotion, which is not property and could not be transferred to the trustee for disposition. This is obvious.

What clouds the picture are the legal proceedings against Ehrman to which Scarborough, but only Scarborough, was privy. But this fact should not blur the distinction between him and Standard. Standard was not a party, and knew nothing first hand about the proceedings, which were, again, against Ehrman for looting.

The "contingency" of recovery was as to Standard at least three times removed. First, there was the unstated nature of the claim of Scarborough against Ehrman, which might have been subject to a defense. Second, assuming Scarborough's success, there was the issue of what would actually be returned given the fact that Scarborough's claim of finding assets was disputed by the S.E.C., and Ehrman listed the disgorgement order on his own bankruptcy petition in order to nullify it. Third, assuming some recovery, there was the issue of how much would be distributed to Transwestern investors after Transwestern's other liabilities were satisfied. Is it not apparent that any recovery was highly speculative, a mere possibility?

How, then, could Standard be convicted of concealing "property" which did not exist? It was only a mere possibility, and one cannot be convicted of concealing a state of being. All of which leads to the last point.

V
Concealment Cannot Apply to an Omission by Itself

Standard was not convicted of making a false statement, but of concealment. He argued that as a remote contingency, the possibility of disgorgement amounted to no more than the omission to so state on his schedules. In the nature of things, he could not conceal -- physically hide -- a hope. He argued, therefore, the jury should have been instructed that the failure to state the hope on the schedules had to be material to convict.

The Court of Appeals, however, held that materiality was not an element of concealment, citing, U.S. v. Grant, 971 F.2d. 800, 804 (1st Cir., 1992). But Grant dealt with a combination of physical concealment and a failure to declare. In Grant, paintings were removed from the bankrupt's house as well as undisclosed on the schedules. The court held that there was a concealment and that concealment as such need not be material.

Similarly, in a New York case, concealment was found not in the bankrupt itself but in one of its employee's stealing cash from the company, depriving creditors of cash assets. The court found concealment, however, based on the theft alone. U.S. v. Guiliano, 644 F.2d. 85, 87 (2 Cir. 1981). Guiliano did not even advert to the schedules as the thief was not the bankrupt.

Reading Grant and Guiliano together, it becomes apparent that, essential to a charge of concealment, there must be a physical sequestration; that concealment is the act of hiding physical property. This could not be so here as the expectancy was not evidenced by any writing embodying it and could not be hidden away. The expectation was based only on oral conversations;[10] no "assets"

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[10] As noted supra, the conversations were tenuous at best. In the first conversation, Scarborough merely stated that Ehrman and Transwestern were subject to court orders to pay a certain sum of money, called "disgorgements." A court order simply cannot be the basis for Standard's conviction, especially when

were known to Standard or actually recovered within the indictment dates (6/20/91-6/30/93); and, the $66,875 eventually paid by Ehrman to the trustee took place after June 30, 1993, and after the bankruptcy had already been dismissed. Standard never had possession of the money. The government simply misindicted.

Alternatively, if a concealment can be based only on a failure to disclose, still a failure to disclose is treated as an affirmative false statement. See, U.S. v. Lindholm, 24 F.3d. 1078, 1082 (9 Cir. 1994). Diamant, the Trustee, said as much when he testified that Standard should have listed the "expectancy" on his amended schedules. In other words, a failure to disclose came about through Standard's alleged false statement made on the amended schedules. His "expectancy" should have been listed.

One cannot separate the concealment from the making of a false statement; they are one in the same. Thus, the need to instruct the jury that the concealment must be material becomes clear, especially here, where there is a reasonable basis to support Standard's belief that there were not any assets. The prospect was speculative at best, based solely on unconfirmed oral representations.

Ehrman was attempting to nullify it through his own bankruptcy proceeding. The other conversation, dealing with assets Scarborough thought he found in other companies, dealt with an unproved and unverifiable assertion which Standard could not cross-examine Scarborough about.

And even under the authority Chief Judge Hug himself established, the failure to charge that a false statement must be material to convict is reversible per se. U.S. v. Gaudin, 28 F.3d. 943 (9 Cir. 1994).

Here, the whole and only basis of the conviction is the failure to disclose, a statement, yet the court did not charge a materiality element, thereby committing reversible error under its own authority. Quite obviously, materiality must be essential to a hope, which is already once removed from a legal interest. Had the jury been charged that an expectancy had to be material - having a tendency to increase the present value of the estate - almost certainly an acquittal would have resulted.

This is an important federal question that this Court itself should settle. Rule 10.1(c).

Conclusion

For all the foregoing reasons, Standard requests the Court grant his petition.

Respectfully submitted,

Date: 11/17/96

William J. Cleary, Jr.
Attorney for Petitioner
Robert M. Standard

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Exhibit A:
Opinion Of The Court of Appeal

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed April 26, 1996
Cathy A. Catterson, Clerk
U.S. Court Of Appeals

UNITED STATES OF AMERICA, Plaintiff-Appellee,	No. 95-50069 D.C. No. CR-94-00384-MLR
v.	
	MEMORANDUM*
ROBERT MICHAEL STANDARD, aka: Robert Standard, Defendant-Appellant	

Appeal from the United States District Court for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted December 11, 1995
Pasadena, California

Before: HUG, Chief Judge, BEEZER, and KLEINFELD, Circuit Judges

* This disposition is not appropriate for publication and may not be cited to or used by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Defendant Robert Standard appeals from convictions for two counts of subscribing to false income tax returns in violation of 26 U.S.C. Section 7206(1), for two counts of bank fraud in violation of 18 U.S.C. Section 1014, and for one count of bankruptcy fraud in violation of 18 U.S. Code Section 152. He appeals the sentence imposed for those convictions. We have jurisdiction pursuant to 28 U.S. Code Section 1291 and 18 U.S. Code Section 3742. We reverse in part, affirm in part, and remand for resentencing.

I

In 1987, the State Bar of California commenced an investigation of one of its members, Robert Standard, a personal injury lawyer. He was investigated for misappropriating client funds, for misusing his trust account, and for using cappers in the solicitation of business.[1]

In order to obtain clients, Standard paid third parties, which he called "sources," for referrals. In his 1987 United States tax return, Standard excluded these referral fees from gross income by including them in "cost of goods sold" as "associate/atty fees." In his 1988 return, Standard deducted these referral fees from gross income by including them in "other expenses" as

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1 A capper, under California law, is a person who acts as "an agent for an attorney at law...in the solicitation or procurement of business for such attorney." Cal. Bus. & Prof. Code Section 6151(a).

"sign ups."

Based on these reductions to income, Standard was indicted for two counts of tax fraud. The government's theory was that the referral fees were not properly included in "cost of goods sold" in 1987 and in "other expenses" in 1988, and therefore, those figures were overstated. The government alleged that Standard knew that these inclusions were improper and was guilty of two counts of tax fraud as a person who "[w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter." 26 U.S.C. Section 7206(1).

As a result of the investigation by the California State Bar for, among other things, capping, Standard left his law firm and resigned from the bar. While his troubles with the bar were ongoing, Standard applied for two bank loans to enable him to purchase land and to construct a luxury residence. First Pacific Bank loaned him $966,500 and Topa Savings Bank extended him a line of credit for $1,800,000. The government contends that Standard made material false statements in his loan applications about his law practice and his status as an attorney. He was indicted for two counts of bank fraud under 18 U.S.C. Section 1014.

Standard's troubles ultimately led to his bankruptcy. When he filed his initial bankruptcy schedule of assets and

liabilities, Standard failed to disclose that he had an investment in Transwestern Oil and Gas, and he did not amend that schedule to include the investment during his bankruptcy. Standard claimed that he did not do so because the investment was a worthless investment sold to him by a con-man. The government, however, claimed that Standard had an expectancy of receiving some of his investment back and that he was negotiating for such a return. Standard was indicted for bankruptcy fraud pursuant to 18 U.S.C. Section 152 for concealing this asset.

II

Standard first appeals his convictions for two counts of tax fraud pursuant to 26 U.S.C. Section 7206(1). The elements of the crime proscribed by section 7206(1) are:

> (1) the defendant made and subscribed a return, statement, or other document that was incorrect as to a material matter; (2) the return, statement, or other document subscribed by the defendant contained a written declaration that it was made under the penalties of perjury; (3) the defendant did not believe the return, statement, or other document to be true and correct as to every material matter; and (4) the defendant falsely subscribed to the return, statement, or other document willfully, with the specific intent to violate the law.

United States v. Marabelles, 724 F.2d 1374, 1380 (9th Cir. 1984).

A tax deficiency is not an element of this crime. Id.

Standard was indicted for two counts of subscribing to a false tax return in violation of section 7206(1). Count one charged that Standard's 1987 income tax return overstated his exclusion for "cost of goods sold," and count two charged that standard's 1988 income tax return overstated his deduction for "other [business] expenses." Standard included in these items payments made to cappers to solicit business. Standard was convicted on both counts.

Standard contends that the government failed to prove that he was not entitled to include his capping expenses in "cost of goods sold" or "other [business] expenses." He contends that his convictions pursuant to 7206(1) must be reversed because the government failed to prove the first element of the offense, that the defendant made and subscribed a return that was incorrect as to a material matter. There is sufficient evidence to support a conviction if, reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. United States v. Vgeri, 51 F.3d 876, 879 (9th Cir. 1995).

The government argues that Standard's material misstatement consisted of excluding in 1987 and deducting in 1988 capping payments which were illegal under California law and therefore nondeductible under 26 U.S.C. Section 162(c)(2). Section 162(a) allows a deduction for ordinary and

necessary business expenses. Section 162(c)(2) provides that no deduction shall be allowed for a payment "if the payment constitutes an ... illegal payment under ... any law of a State (but only if such State law is generally enforced), which subjects the payor to a criminal penalty or the loss of license or privilege to engage in a trade or business."[2]

A

Standard argues that his count one conviction must be reversed because section 162(c)(2) only applies to deductions, and does not apply to exclusions. We agree. despite the government's argument that whether Standard excluded the fees or deducted them is merely "semantics," the distinction is very real. In Max Sobel Wholesale Liquors v. Commissioner, 630 F.2d 670 (9 Cir. 1980), we held that section 162(c)(2) applies only to deductions, not to exclusions, and that kickbacks which are nondeductible under section 162(c)(2) may be excluded from gross income if they can be classified as components of cost of goods sold.

The government argues that Max Sobel is distinguishable because in Standard's case there were no goods sold and therefore Standard made a misstatement by including his payments in cost of goods sold. The government is correct, but its distinguishing of Max Sobel does not get it very far. Section 7206(1), in addition

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[2] As interpreted by the IRS, "State law means a statute of a State." 26 C.F.R. Section 1.162-18(b)(2).

to a misstatement, requires knowledge and willfulness. The government put on evidence that Standard knew the capping payments were illegal and that he knew he could not deduct them, but it did not put on any evidence that Standard knew he could not exclude them as cost of goods sold or that he willfully listed them as cost of goods sold with the specific intent to file a false tax return. We reverse Standard's count one conviction.

Count two, on the other hand, was based on an allegedly improper deduction, and thus section 162(c)(2) applies. The government contends that the payments deducted were "illegal" under California law. Section 6152(a)(1) of the California Business and Professions Code provides that it is unlawful for any person to act as a capper for an attorney. Section 6152(a)(2) provides that it is unlawful for any person, including an attorney, to solicit another person to violate subsection (a)(1). The government argues that Standard violated section 6152(a)(2) by paying his cappers. Standard argues that his payments did not violate section 6152(a)(2) because section 6152(a)(2) prohibits soliciting cappers, not paying cappers. This part of the case turns on whether payments to cappers are illegal under the California statute.

If an activity is illegal, but the payments associated with it are not, then the payments may be deductible. In Commissioner v. Sullivan, 356 U.S. 27, 27 (1958), the Supreme Court held that "amounts expended to ... hire employees for the conduct of alleged illegal ... enterprises are deductible as ordinary and

necessary business expenses." The court stated that "[d]eductions are a matter of grace and Congress can, of course, disallow them as it chooses," but if Congress has not spoken, business expenses are deductible. Id. at 28. The Court held that bookies could deduct rent and wages paid to operate their illegal gambling businesses.

After Sullivan, Congress amended the statute, by adding section 162(c)(2):

> No deduction shall be allowed under subsection (a) for any payment...made directly or indirectly to any person, if the payment constitutes an illegal bribe, illegal kickback, or other illegal payment under any law of the United States, or under any law of a State (but only if such State law is generally enforced), which subjects the payor to a criminal penalty or the loss of license or privilege to engage in a trade or business. For purposes of this paragraph, a kickback includes a payment in consideration of the referral of a client, patient, or customer....

26 U.S.C. Section 162(c)(2).

Under this tax law, the deduction is not allowed if the "payment constitutes" the bribe or kickback or is an "illegal payment." Assuming the statute prohibiting bookmaking did not prohibit bookies from paying their rent, the bookies could still deduct their rent under Sullivan, despite the statutory change.

Only if the payment is illegal under a generally enforced state law is it

nondeductible. Thus, while payments for illegal activities may be deductible, payments which are themselves illegal are not. The payment, not just the activity with which the payment is associated, must be illegal, to cause subsection 162(c)(2) to operate.

California law makes it a crime "to solicit" a person to act as a capper. Cal. Bus. & Prof. Code Section 6152(a)(2). Standard urges that solicitation is complete when the lawyer asks a capper to get him a client, so the payment itself is not a crime. We disagree. While Standard would have been guilty of solicitation had he merely requested his capper to get him a client, the payment did not vitiate the request, nor was it separable from it; it was the inducement which gave the request persuasiveness. To analogize this case to Sullivan, paying the capper is more like bribing an official, than like paying the rent. The payment itself, not just the activity it was associated with, was illegal.

"Solicitation consists of the asking of another to commit [a] specified [crime] with intent that the crime be committed." People v. Gordon, 120 Cal.Rptr. 840, 843-44 (Ct.App. 1975). Solicitation is a "distinct offense, and is punishable irrespective of the reaction of the person solicited; i.e., the solicitor is guilty even though that person immediately rejects the request or proposal." Hutchins v. Municipal Court of Santa Monica, 132 Cal.Rptr. 158, 165 (Ct.App. 1976). "Unlike other criminal offenses, in the crime of 'solicitation' the harm is the asking -- nothing more need be proven." People v.

Miley, 204 Cal.Rptr. 347, 352 (Ct.App. 1984). "The solicitation, without more, is regarded as a sufficient act to take the case out of the sphere of unpunishable intent." Clark & Marshall, Crimes 223 (7th ed. 1967).

The definition of soliciting as merely asking, does not imply that paying someone to commit a crime is not or can not be solicitation. The leading case on solicitation is State v. Schleifer, 121 A.805 (Conn. 1923). The defendant gave a speech, which appears from context to be addressed to striking employees of the New Haven Railroad. He suggested that they "take [scabs] in a dark alley and hit them with a lead pipe," "[d]on't forget to bump off a few now and then," and "take the brake-shoe and put it under something that will put the cars off the irons." Id. at 805. The court said that solicitation was distinguished from unpunishable intent because "solicitation is an act." Id. at 806. The court went on to say that the precedents did not require the solicitation to mature to the point of being an attempt.

Defendant argued in Schleifer that solicitation cases where money was paid should be read as attempt, rather than solicitation, cases, in order to avoid extending their principles to his case. The court rejected this distinction, saying "it does not change its character if the solicitation to crime is accompanied by a bribe and as an inducement to its commission." Id. at 807. Likewise in Standard's case, the solicitation does not lose its character as a solicitation because accompanied by a

promised bribe as an inducement to its commission, nor is the bribe separable from the crime, as paying the rent was separable from placing bets in Sullivan.

The point of the traditional statement, that asking, without more, is solicitation, is not to decriminalize inducements, but to criminalize mere requests. Soliciting in its ordinary meaning means trying to get another person to do something. If it is something which the person might wish to do for his own reasons, as in the striking railroad employees case, then the excitement or suggestion produced by the words may suffice to bring about the solicitor's desired result. If it is something which the hearer has no personal desire to do, as when a lawyer or doctor asks people to bring him clients or patients, then money may be needed to induce the person solicited to act upon the solicitation.

It would not have made sense for the California legislature to say to lawyers, "you may not ask people to send you clients, but if you do, then you may pay them." The money would ordinarily be intended by the solicitor to give the recipient of the solicitation a reason to act on it. We should not interpret statutes to defy common sense. See Cook Inlet Native Ass'n. v. Bowen, 810 F.2d 1471, 1474 (9th Cir. 1987). We conclude that by criminalizing solicitation of cappers, California criminalized paying people to induce them to act as cappers.

Standard's argument that the government failed to prove that section 6152(b)(2) is generally enforced also

fails. A rational trier of fact could have found that sufficient evidence showed that section 6152(b)(2) was generally enforced. Under section 162(c)(2), the state law may "subject the payor to a criminal penalty or the loss of license or privilege to engage in a trade or business." 26 U.S.C. Section 162(c)(2). The deputy city attorney testified that lawyers were prosecuted for violating section 6152(b)(2), and the senior counsel of the state bar testified that lawyers have been disbarred for violating section 6152(b)(2).

C

Standard raises several other challenges to his conviction for count two. Standard first contends that he was improperly indicted for subscribing to a false tax return and that he should instead have been indicted for tax evasion pursuant to 26 U.S.C. Section 7601. This is a question of law which this court reviews de novo. United States v. Rosi, 27 F.3d 409, 414 (9th Cir. 1994). Standard argues that the government's theory was that he was not entitled to reduce his gross income by the payments made to his cappers, not that he did not in fact make the payments. Because he actually incurred the capping expense, he argues, the figures he entered on his return were "true," and in turn, there was no material misstatement of fact.

Standard's argument fails. "Other [business] expenses" is a legally defined concept. Only those expenses which are legally allowable may be included in this schedule. When a taxpayer reports a

figure, he is representing that it is an allowable deduction under the law. If it is not, he has made a misstatement, and he has potentially violated section 7206(1). See, e.g., United States v. Greenberg, 735 F.2d. 29 (2d Cir. 1984) (defendant guilty of subscribing to false tax return for classifying expenditures as business expenses when they were for personal benefit); United States v. Rayor, 204 F.Supp. 486 (S.D. Cal. 1962) (defendant guilty of subscribing to false tax return for deducting personal gambling loss as a legitimate business expense). Therefore, because the government's theory was that Standard could not legally include his capping expense in "other [business] expenses," indictment under section 7206(1) was appropriate.

Standard also argues that the government failed to prove the fourth element of count two, that he falsely subscribed to the return, statement, or other document, willfully, with the specific intent to violate the law.

To prove wilfulness under section 7206(1), the government must show that the defendant did not have a good faith misunderstanding of the law or a good faith belief that he was not violating the law. Cheek v. United States, 498 U.S. 192, 201 (1990). Rather, the defendant "intended to violate the law or knew that his actions would do so." United States v. Claiborne, 765 F.2d 784, 797 (9th Cir. 1985). Wilfulness may be proven with "circumstantial evidence indicating that defendant knew or must have known that his returns were false." Id. at 797-98.

There was sufficient evidence for a rational trier of fact to find that Standard knew that capping was illegal and that his payments to cappers were nondeductible. Standard's former employees testified that everyone in the office knew capping was illegal. The California Bar sent Standard letters telling him it was illegal, and he responded that he had not hired cappers. A former capper testified that Standard told him that capping was "just a misdemeanor and usually they don't prosecute those." Standard's tax preparer also testified that before filing Standard's 1988 tax return, he and Standard discussed the nondeductibility of illegal payments, including referral payments by doctors. Together the tax preparer and Standard consulted the United States Master Tax Guide to determine whether Standard's payments were illegal, and Standard assured him that his capping payments were "in a backhanded way" legal.

Standard also raises four constitutional challenges to his conviction under count two. He argues that section 162(c)(2) violates his privilege against compulsory self-incrimination and violates equal protection, that his prosecution under section 7206(1) for taking a deduction illegal under section 162(c)(2) violates due process, and that section 6152 violates his free speech rights. Standard did not raise these issues at the district court. We will not exercise our discretion to hear these issues on appeal. See Abex Corp. v. Ski's Enter., 748 F.2d 513, 516 (9th Cir. 1984) (holding that a party may not generally raise new issues on appeal and that it is a matter of discretion

whether to entertain such issues).

Standard also argues that the district court gave erroneous jury instructions for his tax fraud convictions. He agreed to the instructions given by the court at trial, without objecting. Therefore, we will review the instructions for plain error only. United States v. Ponce, 51 F.3d 820, 830 (9th Cir. 1995). "Plain error will be found only where necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process." Id. Standard argues that the district court erred: by failing to give instructions on state law and its applicability under section 162(c)(2), by failing to give specific intent instructions, by saying that "illegal payments" are not deductible, by telling the jury that kickbacks are not deductible, and by giving an incorrect good faith instruction.

The district court's actions in these instances do not rise to the level of plain error. The district court instructed that "the State Bar is authorized to enforce state law and has the power to enforce and investigate the unlawful solicitation of clients, which includes payment to nonlawyers for capping." The court also specified that section 162(c)(2) applies "only if such state law is generally enforced." The district court also instructed that "to act willfully, ... means to act voluntarily and deliberately and intending to violate a known legal duty." The court did not commit plain error by telling the jury that illegal payments are not deductible

from gross income or that kickbacks are illegal as the court specified that "[t]he law forbids the deducting of any payment...if the payment constitutes an illegal bribe, kickback, or other illegal payment under any law of the United States or any law of a state, but only if such state law is generally enforced and subjects the individual to a criminal penalty of loss of license or privilege to engage in a trade or business." Finally, the district court's good faith instruction adequately instructed the jury that a person who acts on a good faith belief "is not punishable under this statute merely because that honest belief turns out to be incorrect or wrong."

Finally, Standard challenges his tax fraud conviction by arguing that the underlying indictment was improper because the government misrepresented the law to the grand jury. Because Standard did not raise an objection prior to trial, this objection is waived. See United States v. Smith, 866 F.2d 1092, 1097-98 (9th Cir. 1989); Fed.R.Crim.P. 12(b).

Standard's conviction under count two is affirmed.

III

Standard was convicted of two counts of bank fraud pursuant to 18 U.S.C. Section 1014. Section 1014 provides that it is a felony for a person to knowingly make a false statement for the purpose of influencing the action of, among other entities, a bank insured by the Federal Deposit Insurance Corporation.

Standard appeals his convictions claiming that the district court was not entitled to take judicial notice that the banks involved were insured by the FDIC.[3] We review a decision to take judicial notice under Fed.R.Evid. 201 for an abuse of discretion. United States v. Chapel, 41 F.3d 1338, 1342 (9th Cir. 1994), cert. denied, 115 S.Ct. 2017 (1995).

At the conclusion of his trial, Standard moved under Fed.R.Crim.P. 29 for acquittal on his bank fraud counts because the government failed to prove that the two banks involved were insured by the FDIC. The court responded by suggesting that it could take judicial notice of that fact because it was a "governmental act." The government then requested that such judicial notice be taken claiming that the bank loan applications indicated that the banks were federally insured. The government on appeal now admits that these applications do not contain this information. Thus, the district court took judicial notice of the FDIC insurance without any supporting evidence.[4]

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[3] Proof that a financial institution was federally insured at the time of the allegedly false statement is a necessary element of the offense under section 1014. United States v. Bellucci, 995 F.2d 157, 160 (9th Cir., 1993)

[4] The government on appeal argues that there was evidence of FDIC insurance introduced for one of the two banks, First Pacific Bank. However, the government's argument lacks merit. It points to the fact that one of the bank employees offhandedly noted that his bank had been taken over by the FDIC sometime

The government argues that the district court did not abuse its discretion by taking judicial notice of the FDIC insurance despite the lack of any evidence because FDIC insurance is a fact "not subject to reasonable dispute in that it is...capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed.R.Evid. 201(b). The government supports its argument by quoting a sentence in Chapel that states, "the FDIC, the insuring agency itself, is a 'source whose accuracy cannot be reasonably questioned.'" Chapel, 41 F.3d at 1342. The government argues that because a person could check with the FDIC to determine if the banks in question were FDIC insured, and the FDIC is an accurate source, the court acted properly by taking judicial notice of the FDIC insurance.

The government's reliance on Chapel is misplaced. In Chapel, the government introduced at trial both a certificate of FDIC insurance and the testimony of a witness that after a search of the FDIC

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after the loan in question and that Standard's bankruptcy schedules, filed almost two years after the loan, noted that the FDIC was the successor in interest to First Pacific Bank. This evidence fails because it is irrelevant to the issue whether the bank was FDIC insured on the date the charged offense occurred. See Chapel, 41 F.3d at 1340-41 (holding that while introduction of certificate of insurance was not sufficient, government met burden by introducing evidence that certificate was valid on date of the crime).

records, no record was found terminating that insurance. We first held that this evidence was sufficient to establish that the bank was insured on the date of the crime. Id. at 1341. We then went on to discuss the fact that the district court took judicial notice of the FDIC insurance, and held that the district court did not err by doing so. In this discussion, we noted that the evidence of the FDIC insured status introduced at trial was "substantial and undisputed." Id. at 1342. Specifically, we pointed to the evidence of the FDIC certificate and the evidence submitted that the FDIC did not have a record of terminating this insurance. We then held that "[b]ased on this evidence, we hold that the fact of the Bank's FDIC insured status was not subject to reasonable dispute and that the district court did not err by taking judicial notice pursuant to Rule 201." Id. (emphasis added).

Chapel merely stands for the proposition that because there was overwhelming evidence of FDIC insurance submitted, the court's comment on the FDIC insurance issue was permissible. This holding comports with Schoepflin v. United States, 391 F.2d 390 (9th Cir.), cert. denied, 393 U.S. 865 (1968), an earlier case dealing with this same issue. In Schoepflin, the evidence introduced on the issue of FDIC insurance was substantial and undisputed, and we held that "the trial court's statement concerning judicial notice constituted no more than a permissible comment on the evidence." Id. at 397.

The taking of judicial notice during Standard's trial was not supported by any evidence and was not a permissible comment ont he evidence. The government did not introduce either a certificate of insurance or any testimony that the banks involved were FDIC insured on the date of the alleged crime. The district court's use of judicial notice effectively eliminated the FDIC element of the offense. Just because it might be easy to prove FDIC insured status does not mean that the government need not prove it. All banks are not FDIC insured. Whether the banks from which Standard obtained loans were insured by the FDIC is subject to reasonable dispute.[5] Because judicial notice on this issue was improper and the government failed to introduce any relevant evidence on the FDIC element of the charged offense, Standard's convictions for counts three and four are reversed.

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[5] The government argues that disrict courts may take judicial notice of elements of offenses and cites to United States v. Gold, 378 F.2d 588 (9th Cir. 1967), among other cases, to support this argument. In Gold, the district court took judicial notice of the fact that United Airlines was a common carrier engaged in interstate commerce. We held that the fact that United Airlines was so engaged was "indisputable." Id. At 593. In this case, the fact that the banks involved were FDIC insured is not "indisputable." As Standard so simply explains, "insurance cannot be inferred from the fact that a bank is a bank."

IV

Standard's final conviction was for one count of bankruptcy fraud pursuant to 18 U.S.C. Section 152. Section 152 provides that a person may be imprisoned and fined if he "knowingly and fraudulently conceals from the custodian, trustee, marshal or other officer of the court charged with the control or custody of property, or from creditors in any case under title 11, any property belonging to the estate of a debtor." Standard was indicted for concealing from his creditors and the trustee his investment in Transwestern Oil and Gas. Standard appeals this conviction on several grounds.

A

Standard first argues that the evidence introduced was insufficient to convict him of bankruptcy fraud because there was no evidence that nay property was concealed. There is sufficient evidence to support a conviction if, reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Vgeri, 51 F.3d at 879.

Standard argues that his Transwestern investment was worthless when he filed his bankruptcy schedules on June 21, 1991. He claims that worthless assets need not be scheduled. His argument is primarily based on his testimony that he thought his investment was worthless based on, among other things, a representation made to him by Roy Scarborough, a special master

appointed by a United States district court to search for and seize assets of Transwestern. Scarborough sent a letter in August of 1991 informing the investors that Transwestern appeared to have no recoverable assets besides items such as office furniture, cars, and paintings in the office.

Despite Standard's argument to the contrary, there was more than sufficient evidence for a jury to conclude that he expected some recovery from his Transwestern investment and that he failed to disclose that expectancy. Scarborough testified that Standard contacted him regularly and repeatedly beginning in June, 1991 and continuing throughout his bankruptcy about the possibility of recovering money from his investment. Furthermore, during Standard's voluntary bankruptcy, Scarborough informed him in November, 1991 of a court disgorgement order, and in November, 1992, Scarborough told him that he would likely get some money. Standard did not amend his bankruptcy schedules based on this information. This is sufficient evidence to support Standard's conviction.

B

Standard next argues that his confrontation rights were violated when Lawrence Diamont, the bankruptcy trustee, testified to the following:

> Out of the blue, I received a telephone call, to the best of my recollection, either the last day or two of October, or the first day or two of November [1993], from a Mr. Ehrman [a

> Transwestern employee], who informed me that he had been negotiating with Mr. Standard for a period of time, several months, with regard to how much money Mr. Standard was entitled to out of his partnership interest in Transwestern Oil and Gas; that Mr. Ehrman had found out that Mr. Standard was in bankruptcy, and that, therefore, Mr. Ehrman proposed to send money to me as the bankruptcy trustee.

Standard claims that this evidence was hearsay introduced to establish his state of mind, an element of the crime, and that because Ehrman was not produced as a witness, Standard's confrontation rights were violated. Standard argues this despite the fact that he made no objection at trial.

Standard did not raise this issue at trial, and he has briefed it poorly here. We will not exercise our discretion to consider this issue on appeal. See Abex, 748 F.2d at 516 (holding that party may not generally raise new issues on appeal and that it is a matter of discretion whether to entertain such issues).

C

Standard's third challenge to his bankruptcy fraud conviction is based on alleged deficient jury instructions. He argues that a special unanimity instruction and a materiality instruction should have been given. At trial,

Standard agreed to the instructions that were given by the court and did not object to the instructions as given.[6] When there is no objection to jury instructions at trial, we review only for plain error. Ponce, 51 F.3d at 830. Plain error is found only where necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process. Id. We find no such error.

Standard argues that a special unanimity instruction should have been given because the indictment accused him of concealing his property from both his creditors and the trustee. Standard argues that the jury should have been instructed that it had to agree on the person or entity from whom the property was concealed. Not giving such an instruction was not error because Standard's actions of concealment concealed the property from both the creditors and the trustee. Given the evidence, the jury had to find either that it was concealed from both or neither. There was no evidence that it was concealed from one but not the other.

Standard's argument that the lack of a materiality instruction constituted plain error also fails. He argues that the court should have given an instruction

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[6] The only problem with the instructions came when the district court failed to give the good faith instruction agreed upon by the parties. The government brought this to the court's attention, and the court then gave the instruction. Standard did not object to the instruction.

that the concealment had to be material. Materiality is not an element of this crime, however, and thus no error was committed. See, e.g., United States v. Grant, 971 F.2d 799, 808-09 (1st Cir. 1992).

D

Standard next challenges his bankruptcy fraud conviction on the ground that the proof deviated from the indictment, thus constituting a constructive amendment in violation of the Fifth Amendment. He argues that since the $66,875 ultimately was paid by JNE offshore, not Transwestern, he could not have concealed an asset in Transwestern as the indictment charges. This argument fails. Standard's interest in Transwestern was the basis on which he expected to receive a payment. That he ultimately did receive a payment from an "alter ego" company is irrelevant. His expectancy interest in Transwestern was concealed, and thus the proof accords with the indictment.

E

Standard next challenges his bankruptcy fraud conviction by arguing that the district court erred by limiting his direct and cross-examination of witnesses to such an extent as to deprive him of a fair trial.[7] It is the district

[7] Standard also complains that the testimony of witnesses relevant to the tax fraud and bank fraud counts was unfairly curtailed. Because we reverse his convictions under those counts on

court's province to determine the "relevance of a given topic and the extent of cross-examination to be permitted on that topic." United States v. Brown, 936 F.2d 1042, 1048 (9th Cir. 1991). We review a district court's decision to limit cross-examination for an abuse of discretion. Id. at 1047-48. We also review evidentiary rulings for an abuse of discretion. United States v. Manning, 56 F.3d 1188, 1196 (9th Cir. 1995).

Standard argues that his cross-examination of Lawrence Diamont, the bankruptcy trustee, was unfairly curtailed. He complains that he should have been able to establish that the $66,875 check was attributable to JNE and not to Transwestern. His next questions were irrelevant because the undisclosed asset was his expectancy, not the $66,875 fulfillment of that expectancy. There was no abuse of discretion.

Standard also argues that his own direct examination was unfairly curtailed. It was not. The district court properly sustained objections to questions which were irrelevant, were leading, or sought a hearsay response.

F

Standard further contends that his bankruptcy fraud conviction was invalid because of improper remarks made by the prosecution in its closing argument. Because Standard did not object to the remarks at trial, we review for plain

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other grounds, we need not address those contentions.

error. United States v. Hinton, 31 F.3d 817, 824 (9th Cir. 1994), cert. denied, 115 S.Ct. 773 (1995). Plain error is present "`solely in those circumstances in which a miscarriage of justice would otherwise result.'" United States v. Young, 470 U.S. 1, 15 (1985) (quoting United States v. Frady, 456 U.S. 152, 163 n.14 (1982)). Plain error did not occur here.

Standard first contends that the government's use of the phrase "Mr. Felon" was meant to refer to him and was unduly prejudicial. Standard, however, mischaracterizes the statement. The prosecutor used "Mr. Felon" to refer to Joseph Lee, one of Standard's cappers and a convicted felon, not to refer to Standard. Therefore, Standard's argument for why the use of "Mr. Felon" was prejudicial is unsupported.

Second, Standard contends that the prosecutor's statements that Standard placed himself "above and outside the Law," and that Standard "didn't think twice about asking people to violate the law" resulted in a miscarriage of justice. We disagree. These comments were supported by the evidence presented that standard solicited cappers and that he told at least one of them that capping was merely a misdemeanor. Furthermore, because these comments were made in reference to the tax fraud counts, which we have reversed, and not in reference to the bankruptcy fraud count, there was no prejudice.

V

Standard's final challenge to his

convictions is based on his argument that his tax fraud, bank fraud, and bankruptcy fraud cases should not have been tried together and that the district court improperly denied his motion to severe. Because Standard failed to renew his motion for severance at the close of evidence, this objection is waived. United States v. Restrepo, 930 F.2d 705, 711 (9th Cir. 1991).

VI

Finally, in addition to challenging his convictions, Standard challenges his sentencing under the sentencing Guidelines. Because we have reversed his count one tax fraud conviction and his bank fraud convictions, a sentence must be reimposed, and we need not address these contentions. We remand for resentencing.

VII

We reverse Standard's count one conviction for subscribing to a false income tax return in violation of 26 U.S.C. Section 7206(1) and his convictions for two counts of bank fraud in violation of 18 U.S.C. Section 1014. We affirm Standard's count two conviction for subscribing to a false income tax return in violation of 26 U.S.C. Section 7206(1) and his conviction for bankruptcy fraud in violation of 18 U.S.C. Section 152. We remand for resentencing.

AFFIRMED in part, REVERSED in part and REMANDED.

Exhibit B
Rehearing Order

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed May 22, 1996
Cathy A. Catterson, Clerk
U.S. Court Of Appeals

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROBERT MICHAEL STANDARD, aka: Robert Standard, Defendant-Appellant	No. 95-50069 D.C. No. CR-94-00384-MLR ORDER AMENDING MEMORANDUM DISPOSITION

Before: HUG, Chief Judge, BEEZER, and KLEINFELD, Circuit Judges.

The memorandum disposition filed April 26, 1996, is amended as follows:

Page 16, line 1, delete "Finally," and after the first paragraph, add new paragraphs:

> Finally, Standard argues that his cross-examination of witnesses was unfairly limited. We review a district court's decision to limit cross-examination for abuse of discretion. United States v. Brown, 936 F.2d 1042, 1048 (9th Cir. 1991). Standard argues that

the district court unfairly curtailed his cross-examination of Victoria Molloy, a senior counsel of the state bar, and of Edmond Fimbres, a city attorney. The district court correctly exercised its discretion to limit Standard's irrelevant questions about direct solicitation by lawyers and the prevalence of capping cases at a time unrelated to the period at issue in his case.

Page 24, lines 19-20, change from "United States v. Brown, 936 F.2d 1042, 1048 (9th Cir. 1991)" to "Brown, 936 F.2d at 1048."

Page 24, n.7, line 2, delete "tax fraud and".

In response to appellant's PFR, the panel has voted unanimously to deny the petition for rehearing.

But if premiums for several years are paid in advance, IRS and most courts require the premium to be amortized and deducted over the life of the policy, though one court has allowed a full deduction to a cash basis taxpayer in the year of payment where the taxpayer had consistently deducted premiums in the year of payment.[49]

¶ *1602* Bribes, Kickbacks, Fines and Penalties

No deduction is allowed for certain illegal bribes, kickbacks, rebates and other payments. And fines and penalties for violation of a law, including tax penalties, are not deductible.

No deduction is allowed for any illegal bribe, kickback or other illegal payment under any law of the U.S., or under any law of a state (if the state law is generally enforced), that subjects the payor to a criminal penalty or the loss of license or privilege to engage in business, whether or not that penalty or loss of license actually occurs. A kickback includes a payment in consideration of the referral of a client, patient, or customer. (Code Sec. 162(c)(2))[50]

Business kickbacks, fee-splitting, etc., that aren't specifically disallowed are deductible if they qualify as ordinary and necessary.[1]

¶ *1603* Kickbacks, rebates, and bribes under Medicare and Medicaid.

No deduction is allowed for any payments consisting of any kickback, rebate, or bribe made by any provider of services, supplier, physician, or other person who furnishes Medicare or Medicaid items or services, if made in connection with the furnishing of such items or services or the making or receiving of such payments. A kickback includes a payment for the referral of a client, patient, or customer. For these payments, deduction is denied regardless of legality. (Code Sec. 162(c)(3))[2]

(Continued from ¶1606)

¶ 1604 Illegal business.

The ordinary and necessary expenses incurred in operating an illegal business are deductible, even though payment of the expense and the acts performed by the employees of the business are illegal (e.g., a bookmaker's expenses).[3]

There's no deduction or credit for amounts paid or incurred in connection with illegal drug traffic, (Code Sec. 280E) although gross receipts may be adjusted for costs of goods sold.[4]

¶ *1605* Unlawful payments to government officials or employees.

No business expense deduction is allowed for any payment made directly or indirectly to any federal, state or local public official or employee if the payment is an illegal bribe or kickback. If the payment is to an official or an employee of a foreign government, no deduction is allowed if the payment violates the U.S. Foreign Corrupt Practices Act. (Code Sec. 162(c))[5]

¶ *1606* Fines and penalties.

No business expense deduction is allowed for fines or similar penalties paid to a government for the violation of any law. (Code Sec. 162(f)[6] For example, state law penalties on public school teachers for striking are not deductible. Similarly, penalties paid for violating fe deral environmental protection laws are not deductible.[7]

Also, penalties paid in connection with federal, state, and local taxes are generally not

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49. ¶ L-3526; ¶ 1624.081.
50. ¶ L-2605; ¶ 1624.384.
1. ¶ L-2605; ¶ 1624.384.
2. ¶ L-2610; ¶ 1624.384.
3. ¶ L-2616; ¶ 1624.382.
4. ¶ L-2617; ¶ 280E4.
5. ¶ L-2601; ¶ 1624.384.
6. ¶ L-2701 *et seq.*; ¶ 1624.388.
7. ¶ L-2701.

Footnote references beginning with letters are to paragraphs in RIA's Federal Tax Coordinator 2d and RIA's Analysis of Federal Taxes: Income. Footnote references beginning with numbers are to paragraphs in RIA's United States Tax Reporter.

deductible-for example, penalties for negligence, delinquency, or fraud relating to federal taxes, (Reg § 1.162-21(b)) and for failure to withhold payroll taxes.[8]

¶ 1607 Public policy.

Public policy is not a ground for denying deduction. Unless a payment is nondeductible by law, it is deductible if ordinary and necessary. Reg § 1.162-1)[9]

¶ 1608 Miscellaneous Business Expenses

Advertising expenses, tax determination expenses, royalty payments, circulation costs, trademark and trade name expenditures, mine exploration and development costs, and other miscellaneous costs of carrying on a business are deductible subject to certain conditions and limits.

¶ 1609 Advertising and business promotion costs.

Advertising and business promotion costs relating to an existing business can be deducted currently, even though the business benefit they generate may extend over a period beyond the year they are incurred or paid.[10]

Production costs of a business catalog that will remain unchanged for several years must be capitalized according to IRS. but some courts disagree.[11] Display equipment (cabinets, signs, etc.) must be capitalized if it has a useful life beyond the tax year.[12]

¶ 1610 Determining or contesting tax liability.

Costs relating to tax matters that are ordinary and necessary in the course of the conduct of taxpayer's trade or business, including costs of tax advice, are deductible. The deduction applies to expenses incurred in: (1) preparing tax counsel. (Reg § 1.212-1(1))[13] This includes expenses incurred by an individual taxpayer in:[14]

(Continued from ¶1607)

• preparing that portion of the individual's tax return that relates to the taxpayer's business as sole proprietor,

• preparing schedules relating to income or loss from rentals or royalties, or farm income and expenses, and

• resolving asserted tax deficiencies relating to a business, to rental or royalty in come, or to a farm.

For deduction of tax determination costs as nonbusiness expenses, (i.e., as miscellaneous itemized deductions subject to the 2% (¶ 3107° floor°, see ¶ 2164.

For alternative minimum tax treatment of nonbusiness expenses by an individual, see ¶ 3208.

¶ *1611* Royalty payments.

Royalty payments made for the right to use patents, copyrights and similar rights are deductible.[15] Payments to acquire the property itself are capital expenditures.[16]

¶ *1612* Circulation costs.

Publishers of periodical can deduct currently their expenditures, to establish, maintain and increase circulation. (Code Sec. 173)[17] Or, instead, they may elect to capitalize those costs. (Reg § 1.173-1(c))[18] A taxpayer may elect to amortize circulation costs over three years beginning with the year in which the expenditure is made (Code Sec. 59(e)(1) For

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8. ¶ L-2709; ¶ 1624.388.
9. ¶ L-2609; ¶ 1624.377.
10. ¶ L-2204; ¶ 1624.355.
11. ¶ L-2205; ¶ 1624.355.
12. ¶ L-2206; ¶ 1624.355.
13. ¶ L-3000 *et seq.*; ¶ 2124.14.
14. ¶ L-3000.
15. ¶ L-3201; ¶ 1624.284.
16. ¶ L-3202; ¶1624.284.
17. ¶s L-2213; ¶ 1734.01.
18. ¶ L-2215 *et seq.*; ¶ 1734.

Footnote references beginning with letters are to paragraphs in RIA's Federal Tax Coordinator 2d and RIA's Analysis of Federal Taxes: Income. Footnote references beginning with numbers are to paragraphs in RIA's United States Tax Reporter.

Exhibit D
American Jurisprudence Excerpt

¶ 16455. Expenses of an illegal business. The ordinary and necessary expenses incurred in operating an illegal business (other than trafficking in illegal drugs, see below) are deductible, even though payment of the expense and the acts performed by the employees of the business are illegal. For example, rent and salaries paid by a bookmaker were deductible business expenses even though bookmaking, and the payment of rent for the use of premises for bookmaking, were illegal under state law.

Deductions incurred by an illegal business have been denied where not directly connected with operation of the business.

All deductions and credits for amounts paid or incurred in connection with the trade or business of trafficking in illegal drugs are defined as controlled substances within the meaning of schedules I and II of the Controlled Substances Act, the trafficking in which is prohibited by either Federal law or the state law for the state in which the trade or business is conducted. The rule does not affect the adjustment made to gross receipts on account of the effective cost of goods sold. For the availablility of an adjustment to cost of goods sold in the case of an illegal rebate or discount, see ¶ 16451.

Exhibit E
Transcript Excerpt

THE COURT:

"This is not a case that the City Attorney's Office does. It is not a case about [whether the statute (see §6152) is enforced], Mr. Braun. I'm telling you right now." (Reporter's Transcript 8/30/94, page 127.)(1 RT 127, 19-27.)